

Buddy Garcia, *Chairman*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 17, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: 301 LONE OAK PARTNERS, LTD.
TCEQ DOCKET NO. 2009-0869-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,



James B. Murphy
Assistant Public Interest Counsel

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 AUG 17 PM 12:39

CHIEF CLERKS OFFICE

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NO. 2009-0869-MWD

**IN THE MATTER
OF THE APPLICATION OF
301 LONE OAK PARTNERS, LTD.,
FOR TPDES PERMIT
NO. WQ0014870001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on
Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in
the above-referenced matter and respectfully shows the following.

2009 AUG 17 PM 2:39
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QUALITY

I. INTRODUCTION

A. Background of Facility

301 Lone Oak Partners, Ltd., (Applicant) applied to TCEQ for a new permit, proposed Texas Pollution Discharge Elimination System (TPDES) permit number WQ0014870001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 252,000 gallons per day. Applicant has not constructed the treatment facility, which will be an activated sludge process plant operated in the complete mix mode. Treatment units will include a bar screen, aeration basin, final clarifier, aerobic sludge digester, and chlorine contact chamber.

The proposed facility will be located approximately 2,800 feet south of Cypress Creek, north of Farm-to-Market Road 1960, and 3,600 feet west of Cypresswood Drive in Harris County, Texas. The facility will serve a residential subdivision. The treated effluent will be discharged to an unnamed ditch, thence into a county roadside ditch, thence into a county

drainage channel, thence into Turkey Creek, thence into Cypress Creek, thence into Spring Creek, thence into the San Jacinto River in Segment No. 1009 of the San Jacinto River Basin. The unclassified receiving water uses are no significant aquatic life uses for the unnamed ditch and county roadside ditch. The designated uses for Segment No. 1009 are high aquatic life uses, public water supply, and contact recreation.

The effluent limits in the draft permit, based on a 30-day average, are 10 milligrams per liter (mg/l) 5-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l total suspended solids (TSS), 2 mg/l ammonia-nitrogen, and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

B. Procedural Background

TCEQ received this application on January 10, 2008. On March 6, 2008, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on April 4, 2008 in the *Houston Chronicle*. The ED completed the technical review of the application on April 24, 2008, and prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on July 8, 2008, and it was published on August 15, 2008 in the *Houston Chronicle*. The Notice of Public Meeting was published on December 19, 2008 in the *Houston Chronicle*, and a public meeting was held on January 20, 2009. The public comment period ended on January 20, 2009. On May 4, 2009, the ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on May 7, 2009. The deadline to request a contested case hearing was June 8, 2009.

TCEQ received timely comments and requests for a contested case hearing in nearly identical form letters from Meggan Ardiffe, Addy Ardiffe-Fulton, Ellie Ardiffe-Fulton, Steven David, Deenen Fulton, Dennis Fulton, Jr., Dennis Fulton, Sr., Kristina Fulton, Peggy Fulton, S.D. Fulton, Scott Fulton, Tiffany Fulton, Tyler Fulton, and Stephanie Fulton-David (Fulton family), and Gail Blair, Nancy Carmichael, and Lora Roark on January 20, 2009. TCEQ received additional timely comments from Dennis Fulton, Sr. on January 20, 2009. Finally, TCEQ received timely comments and a request for a contested case hearing from Jessica Lacy on behalf of the co-owners of Zanzibar Farms on January 20, 2009 by letter dated March 26, 2007. OPIC recommends granting the hearing requests submitted by Meggan Ardiffe, Addy Ardiffe-Fulton, Ellie Ardiffe-Fulton, Steven David, Deenen Fulton, Dennis Fulton, Jr., Dennis Fulton, Sr., Kristina Fulton, Peggy Fulton, S.D. Fulton, Scott Fulton, Tiffany Fulton, Tyler Fulton, Stephanie Fulton-David, and Jessica Lacy, and denying the hearing requests of Gail Blair and Nancy Carmichael. OPIC further recommends referring the issue of Lora Roark's standing to the State Office of Administrative Hearings (SOAH).

II. APPLICABLE LAW

This application was declared administratively complete on August 5, 2005. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal

justiciable interest affected by the application showing why the requestor is an “affected person” who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an “affected person” is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public.

Id. Relevant factors considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact raised during the comment period and that are relevant and material to the Commission’s decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;

- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

III. DISCUSSION

A. Determination of Affected Person Status

1. Jessica Lacy

Jessica Lacy timely filed a request for a contested case hearing on behalf of the co-owners of Zanzibar Farms. She lists the farm's address as 21414 Broze Road, Humble 77338, which is less than 1/2 mile from the proposed facility and discharge route. Applicant lists Jessica Lacy and Terry Stevens at this address as No. 15 on the Adjacent Landowner List submitted with the application.

Ms. Lacy expresses concerns related to the proposed facility's adverse effects on wetlands, the Harris County Spring Creek Greenway Project, nearby water wells, and surfacewater, groundwater, and air quality. She is concerned the proposed facility will contribute to agricultural runoff from surrounding property and management is unqualified to operate the facility due to conflicts of interest. She states that Applicant failed to provide proper notice to surrounding municipal utility districts. She is also concerned the proposed residential development is based on flawed market demand data and improperly calculates district acreage, lot sizes, lot values, and proposed tax revenues, and its detention pond is inadequate.

Ms. Lacy's interests in water quality are protected by the law which governs this application. 30 TAC § 55.203(c)(1). Because of the location of her farm relative to receiving waters and the facility, there is a reasonable relationship between her interest in protecting water quality and the wastewater activities to be regulated under the permit. 30 TAC § 55.203(c)(3). In addition, there is a likely impact on Ms. Lacy's health, safety, and use of her property and nearby natural resources due to the proximity of the proposed facility and discharge route. 30 TAC § 55.203(c)(4) and (5). For these reasons, OPIC concludes Jessica Lacy is an affected person entitled to a contested case hearing.

2. Fulton Family

Meggan Ardiffe, Addy Ardiffe-Fulton, Ellie Ardiffe-Fulton, Steven David, Deenen Fulton, Dennis Fulton, Jr., Dennis Fulton, Sr., Kristina Fulton, Peggy Fulton, S.D. Fulton, Scott Fulton, Tiffany Fulton, Tyler Fulton, and Stephanie Fulton-David timely filed requests for a contested case hearing. They list their address as 21310 Broze Road, Humble 77338, which is less than 1/2 mile from the proposed facility and discharge route. Applicant lists Peggy Fulton at this address as No. 20 on the Adjacent Landowner List submitted with the application.

In nearly identical form letters, the Fulton family expresses concern about adverse effects on use and enjoyment of their property and potential flooding problems caused by the proposed facility. They express concern about operation and maintenance of the facility and the potential for accidental discharges or overflow of effluent from the facility, in particular those caused by hurricanes. In additional comments submitted contemporaneously with the form letter, Dennis Fulton, Sr. expresses concern over the lack of design plans for the proposed facility and whether the permitted flow is sufficient to accommodate the residential community planned for the area. He also expresses concern about adverse effects on wildlife and property values.

The Fulton family's interests in water quality are protected by the law which governs this application. 30 TAC § 55.203(c)(1). Because of the location of their property relative to receiving waters and the facility, there is a reasonable relationship between the Fulton family's interest in protecting water quality and the wastewater activities to be regulated under the permit. 30 TAC § 55.203(c)(3). In addition, there is a likely impact on the Fulton family's health, safety, and use of their property due to the proximity of the proposed facility and discharge route. 30 TAC § 55.203(c)(4). For these reasons, OPIC concludes Meggan Ardiffe, Addy Ardiffe-Fulton, Ellie Ardiffe-Fulton, Steven David, Deenen Fulton, Dennis Fulton, Jr., Dennis Fulton, Sr., Kristina Fulton, Peggy Fulton, S.D. Fulton, Scott Fulton, Tiffany Fulton, Tyler Fulton, and Stephanie Fulton-David are affected persons entitled to a contested case hearing.

3. Lora Roark

Lora Roark timely filed a request for a contested case hearing. She lists her address as 430 Castlebar Court, Houston 77015. She also states that her boyfriend is a property owner near the facility, but does not elaborate. She expresses concern about adverse effects on use and enjoyment of her property and potential flooding problems caused by the proposed facility. She expresses concern about operation and maintenance of the facility and the potential for accidental discharges or overflow of effluent from the facility, in particular those caused by hurricanes.

Ms. Roark has not demonstrated a personal justiciable interest in this proceeding. The address she provides is approximately 19 miles from the proposed facility and she does not provide any information on the location of her boyfriend's residence, and for these reasons, there is insufficient information to conclude there is a reasonable relationship between Ms. Roark's interest in protecting water quality and the wastewater activities to be regulated under the permit

or a likely impact on her health, safety, or use of her property. 30 TAC § 55.203(c)(3) and (4). Accordingly, OPIC recommends referring the issue of Ms. Roark's standing to SOAH for a determination of whether she has a personal justiciable interest in this proceeding based on the location and frequency of use of her boyfriend's residence.

4. Gail Blair

Gail Blair timely filed a request for a contested case hearing. She lists her address as 31419 Blue Heron Lane, Fulsher 77441. In a nearly identical form letter, she expresses the same concerns as Lora Roark and the Fulton family.

Ms. Blair has not demonstrated a personal justiciable interest in this proceeding. The address she provides is approximately 42 miles from the proposed facility, and for this reason, there is not a reasonable relationship between Ms. Blair's interest in protecting water quality and the wastewater activities to be regulated under the permit or a likely impact on her health, safety, or use of her property. 30 TAC § 55.203(c)(3) and (4). Her interest in this proceeding is "[a]n interest common to members of the general public and does not qualify as a personal justiciable interest." 30 TAC § 55.203(a). Accordingly, OPIC concludes Ms. Blair is not an affected person entitled to a contested case hearing.

5. Nancy Carmichael

Nancy Carmichael timely filed a request for a contested case hearing. She lists her address as 26114 Wildflower, Magnolia 77354. In a nearly identical form letter, she expresses the same concerns as Lora Roark and the Fulton family.

Ms. Carmichael has not demonstrated a personal justiciable interest in this proceeding. The address she provides is approximately 20 miles from the proposed facility, and for this reason, there is not a reasonable relationship between Ms. Carmichael's interest in protecting

water quality and the wastewater activities to be regulated under the permit or a likely impact on her health, safety, or use of her property. 30 TAC § 55.203(c)(3) and (4). Her interest in this proceeding is “[a]n interest common to members of the general public and does not qualify as a personal justiciable interest.” 30 TAC § 55.203(a). Accordingly, OPIC concludes Ms. Carmichael is not an affected person entitled to a contested case hearing.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

1. Whether the proposed facility will adversely affect the use and enjoyment of property. (Fulton family, Lora Roark, Gail Blair, Nancy Carmichael)
2. Whether the proposed facility will increase flooding problems in the area. (Fulton family, Lora Roark, Gail Blair, Nancy Carmichael)
3. Whether the draft permit contains adequate conditions to ensure operation and maintenance of the facility is in accordance with regulatory requirements. (Fulton family, Lora Roark, Gail Blair, Nancy Carmichael)
4. Whether the draft permit contains adequate safeguards against accidental discharges or overflow of effluent from the proposed facility. (Fulton family, Lora Roark, Gail Blair, Nancy Carmichael)
5. Whether Applicant’s design plans comply with the draft permit and regulatory requirements. (Dennis Fulton, Sr. Comment #1)
6. Whether the proposed facility will adversely affect wildlife in the area. (Dennis Fulton, Sr. Comment #2)
7. Whether the permitted flow of the proposed facility is sufficient to accommodate the residential community planned for the area. (Dennis Fulton, Sr. Comment #3)
8. Whether the proposed facility will adversely affect property values. (Dennis Fulton, Sr. Comment #4)
9. Whether the proposed facility will adversely affect wetlands. (Jessica Lacy)
10. Whether the proposed facility will adversely affect the Harris County Spring Creek Greenway Project. (Jessica Lacy)
11. Whether the application is based on flawed market demand data. (Jessica Lacy)

12. Whether the application properly accounts for water wells on nearby property. (Jessica Lacy)
13. Whether the application properly calculates district acreage. (Jessica Lacy)
14. Whether the proposed facility will adversely affect water quality by contributing to agricultural runoff from surrounding property. (Jessica Lacy)
15. Whether Applicant properly provided notice to surrounding municipal utility districts in accordance with regulatory requirements. (Jessica Lacy)
16. Whether the proposed development's detention pond is adequate to meet regulatory requirements. (Jessica Lacy)
17. Whether the application provides accurate lot sizes, lot values, and proposed tax revenues. (Jessica Lacy)
18. Whether management is qualified to operate the facility in accordance with regulatory requirements. (Jessica Lacy)
19. Whether the proposed facility will adversely affect groundwater quality. (Jessica Lacy)
20. Whether the proposed facility will adversely affect air quality. (Jessica Lacy)

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests, except Issue No. 15. In response to the comment, the ED requested Applicant provide updated capacity letters from any regional wastewater treatment provider within three miles of the proposed facility.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC

§ 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of water quality under Chapter 26 of the TEX. WATER CODE and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Furthermore, the proposed permit must comply with 30 TAC §§ 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights, and require minimization of exposure to nuisance conditions. In addition, Applicant is required to control and abate nuisance odor under 30 TAC §§ 307.4(b)(1) and 309.13(e). Therefore, Issue Nos. 1, 3, 4, 6, 9, 10, 12, 14, 18, and 19 relating to health impacts, water quality, use and enjoyment of private property, and

potential nuisance conditions are relevant and material issues to the Commission's decision regarding the issuance of this permit.

Furthermore, Issue Nos. 3 and 18 regarding operation and maintenance of the facility are relevant and material under 30 TAC Chapter 30, Subchapter J. Issue No. 5 related to design plans is relevant and material under 30 TAC Chapter 217. Issue No. 7 related to permitted flow is relevant and material under 30 TAC § 217.32. Issue Nos. 9 and 10 related to wetlands are relevant and material under 30 TAC § 309.13(b). Issue No. 12 related to nearby water wells is relevant and material under 30 TAC § 309.13(c). Issue No. 15 related to notice to surrounding municipal utility districts is relevant and material under TEX. WATER CODE § 26.081(a) and its implementing provisions.

On the other hand, Issue No. 2 related to flooding, Issue No. 8 related to property values, Issue Nos. 11, 13, 16 and 17 related to the creation of the residential development, and Issue No. 20 related to air quality are not relevant and material to the Commission's decision on this permit.

G. Issues Recommended for Referral

OPIC recommends the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed facility will adversely affect the use and enjoyment of property.
2. Whether the draft permit contains adequate conditions to ensure operation and maintenance of the facility is in accordance with regulatory requirements.
3. Whether the draft permit contains adequate safeguards against accidental discharges or overflow of effluent from the proposed facility.
4. Whether Applicant's design plans comply with the draft permit and regulatory requirements.
5. Whether the proposed facility will adversely affect wildlife in the area.

6. Whether the permitted flow of the proposed facility is sufficient to accommodate the residential community planned for the area.
7. Whether the proposed facility will adversely affect wetlands.
8. Whether the proposed facility will adversely affect the Harris County Spring Creek Greenway Project.
9. Whether the application properly accounts for water wells on nearby property.
10. Whether the proposed facility will adversely affect water quality by contributing to agricultural runoff from surrounding property.
11. Whether management is qualified to operate the facility in accordance with regulatory requirements.
12. Whether the proposed facility will adversely affect groundwater quality.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 55.115(d) requires any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

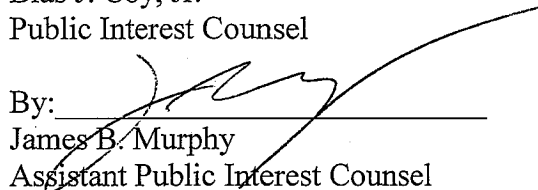
IV. CONCLUSION

OPIC recommends granting the hearing requests from Meggan Ardiff, Addy Ardiff-Fulton, Ellie Ardiff-Fulton, Steven David, Deenen Fulton, Dennis Fulton, Jr., Dennis Fulton, Sr., Kristina Fulton, Peggy Fulton, S.D. Fulton, Scott Fulton, Tiffany Fulton, Tyler Fulton, Stephanie

Fulton-David, and Jessica Lacy on the issues referenced above. OPIC recommends referring the issue of Lora Roark's standing to SOAH for a determination of whether she has a personal justiciable interest in this proceeding. OPIC recommends denying the hearing requests from Gail Blair and Nancy Carmichael. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2009 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


James B. Murphy

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MAILING LIST
301 LONE OAK PARTNERS, LP.
TCEQ DOCKET NO. 2009-0869-MWD

FOR THE APPLICANT:

Cliff Parks
Lippke Cartwright & Roberts, Inc.
7322 Southwest Freeway, Ste. 1717
Houston, Texas 77074-2083
Tel: (713) 800-5305
Fax: (713) 800-5301

FOR THE EXECUTIVE DIRECTOR:

Daniel Ingersoll, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Kent Trede, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1747
Fax: (512) 239-4430

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE
RESOLUTION:**

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

See attached list.

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COMMISSION
ON ENVIRONMENTAL
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CHIEF CLERKS OFFICE

MEGGAN ARDIFF
21310 BROZE RD
HUMBLE TX 77338-1266

ELLIE ARDIFF FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

GAIL BLAIR
31419 BLUE HERON LN
FULSHEAR TX 77441-4416

KRISTINA J FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

NANCY CARMICHAEL
26114 WILDFLOWER DR
MAGNOLIA TX 77354-6438

PEGGY I FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

STEPHANIE FULTON DAVID
21310 BROZE RD
HUMBLE TX 77338-1266

S D FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

STEVEN DAVID
21310 BROZE RD
HUMBLE TX 77338-1266

SCOTT A FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

ADDY ARDIFF FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

TIFFANY & TYLER FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

DEENEN P FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

TIFFANY FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

DENNIS FULTON, JR
21310 BROZE RD
HUMBLE TX 77338-1266

TYLER FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

DENNIS & PEGGY FULTON
21310 BROZE RD
HUMBLE TX 77338-1266

JESSICA A LACY
21414 BROZE RD
HUMBLE TX 77338-1259

DENNIS FULTON, SR
21310 BROZE RD
HUMBLE TX 77338-1266

LORA J ROARK
430 CASTLEBAR CT
HOUSTON TX 77015-3051